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MILLER ISAR INC.
REGULATORY CONSULTANTS

ANDREW O. ISAR

7901 SKANSIE AVENUE,
SUITE 240
GIG HARBOR, WA 98335
TELEPHONE: 253.851.6700
FACSIMILE: 253.851.6474
HTTP://WWW.MILLERISAR.COM

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May 1, 2003

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
9300 E. Hampton Drive
Capitol Heights, Maryland 20743

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991
CG Docket No. 02-278

Dear Ms. Dortch:

Pursuant to the Commission's *Further Notice and Proposed Rulemaking* in the above-referenced proceeding, and sections 1.1415 and 1.419 of the Federal Communications Commission's rules enclosed are an original and (4) four copies of *Comments* for filing with the Commission.

Please acknowledge this filing by date-stamping and returning the additional copy of this transmittal letter in the self-addressed, postage-paid envelope provided for this purpose.

Questions regarding this filing may be directed to the undersigned at the telephone and facsimile numbers above, or via electronic mail at aisar@millerisar.com.

Sincerely,

MILLER ISAR, INC.

Andrew O. Isar

Regulatory Consultants

cc: Ms. Kelli Farmer, Federal Communications Commission, Rm. 4-C740, 445 12th Street, S.W., Washington, D.C. 20554 (4 Copies)

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List A B C D E

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
	)	

COMMENTS

Miller Isar, Inc., a regulatory relations firm, on behalf of its client (the "Company"),[1] and pursuant to the Commission's *Further Notice of Proposed Rulemaking* ("FNPRM") in the above-captioned proceeding (released March 25, 2003), and sections 1.1415 and 1.419 of the Federal Communications Commission's ("Commission") rules,[2] hereby comments on how the Commission may "maximize consistency" between the Federal Trade Commission's ("FTC") amended Telemarketing Sales Rule ("TSR")[3] and the Commission's own telemarketing rules, consistent with the Commission's expressed policy objectives of avoiding unnecessary burdens on telemarketing companies. The Company specifically comments on the imperative for the Commission to exclude the TSR's call abandonment and answer time obligations, section 310.4(b)(4), from the Commission's rules. The Company maintains that through the exclusion of these call abandonment and answer time provisions from the Commission's telemarketing rules, the Commission will meet its rule harmonization objectives, without imposing onerous and

[1] The Company is a regulated smaller telecommunications service provider client that relies on an in-house sales telemarketing staff to attract new subscribers.
[2] 47 C.F.R. §§ 1.415 and 1.419.
[3] 47 C.F.R. §310.4(b).

unnecessary obligations on smaller telecommunications companies which rely on telemarketing as a primary sales solicitation tool for their own services.

I. INTRODUCTION

The FTC's TSR establishes an effective framework to protect the public from potentially abusive telemarketing practices in general, under the Telephone Consumer Protection Act of 1991,[4] and most recently the Do-Not Call Implementation Act.[5] Yet the efficacies of the TSR in governing the conduct of commercial telemarketing firms who serve a variety of clients are not universal in their applicability to smaller telecommunications companies who engage in telemarketing solely for purposes of soliciting prospective subscribers, such as the Company. Strict imposition of call abandonment and answer time obligations may be appropriate for entities who engage in telemarketing as a primary commercial enterprise. Such obligations, however, stand to be economically devastating to smaller telecommunications companies, if adopted by the Commission. A mirroring of these provisions will significantly increase sales and marketing costs under any circumstance, and will eliminate telemarketing as an effective sales tool for smaller telecommunications companies, with no countervailing added protection to the public.

Although the *Do-Not-Call Act* requires the Commission to "maximize consistency" between its existing telemarketing rules and recent amendments to the TSR, the Commission is not expressly obligated to adopt the provisions of the FTC's amended TSR verbatim. The Commission's stated goal to "enhance consumer privacy protections while avoiding imposing unnecessary burdens on the telemarketing industry, consumers

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[4] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. §227.

[5] Do-Not-Call Implementation Act, Pub L. No. 108-10, 117 Stat. 557 (2003) ["Do-Not-Call Act"].

and regulators,"[6] as well as the Commission's expressed sensitivity to the impact that new rules would have on small business entities, including those who "engage in telemarketing activities and who rely on telemarketing as a method to solicit new business,"[7] remain sound. These important goals should serve as guiding principals for exclusion of costly TSR call abandonment and answering obligations for those telecommunications companies who rely on their own telemarketing expressly to solicit new business for their services.

II. THE FTC'S CALL ABANDONMENT AND ANSWER TIME OBLIGATIONS, IF APPLIED TO SMALLER TELECOMMUNICATIONS COMPANIES WHO EMPLOY IN HOUSE TELEMARKETING STAFFS, WILL RENDER TELEMARKETING ECONOMICALLY UNVIABLE, RAISE MARKETING COSTS, AND SEVERELY IMPEDE THE ABILITY OF SMALLER COMPANIES TO COMPETE.

Pursuant to section 310.4(b)(4) of the TSR,[8] a seller or telemarketer is not deemed liable for violation of the TSR if: 1) technology is employed that ensures a call abandonment rate of no more than three percent (3%) of all calls answered by a person per calling day; 2) unanswered telemarketing calls are disconnected within 15 seconds or four rings; 3) a recorded message stating the name and telephone number of the seller is played if a sales representative is not available to speak to the person answering the call within two seconds after the person's completed greeting; and 4) the telemarketer/seller retains records establishing compliance with provisions 1 through 3 above.

Although the rationale for call abandonment and answer time obligations are understood as necessary to preclude public inconvenience and potential abuse by

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[6] FNPRM at ¶3.

[7] *Id.* citing to *In the Matter of Riles and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd at 17497-501, paras. 70-80.

[8] 47 C.F.R. §310.4(b)(4)

commercial telemarketing firms, imposing like requirements on smaller telecommunications companies who engage in-house telemarketers, will render telemarketing economically unviable as a sales tool. Imposing these provisions will indirectly contribute to increased sales and marketing costs, and generally impede the ability of telecommunications companies which utilize in-house telemarketing staffs, to compete, with negligible countervailing added public protection.

A) Call Abandonment and Answer Time Obligations Would Significantly Increase Sales Costs or Unreasonably Limit the Number of Sales Contacts That Could Be Practically Initiated by In-House Telemarketing Staffs.

The three percent call abandonment and 15 second, four ring call disconnection, or two second call connection obligations residing in TSR section 310.4(b)(4) create significant operational ramifications for telemarketers. To comply, telemarketers must increase staff or accept a reduced number of completed calls that could be made under existing staffing levels, to maintain pre-rule sales activity. Although commercial telemarketing operations may accept associated compliance costs as a "cost of doing business" which can be passed on to their clients - those who engage telemarketing firms - the same is not true of telecommunications companies with limited in-house telemarketing operations. For these companies, TSR section 310.4(b)(4) obligations would dramatically increase sales costs or decrease sales volumes, and force telecommunications companies to assume unacceptable sales cost increases under either option. These costs could not easily be passed on to small end-user customer bases if telecommunications companies intended to remain competitive.

Telecommunications companies that employ their own telemarketers to engage in sales calls to the general public have staffed telemarketing centers at levels that create an acceptable cost per sales ratio. In so doing, these companies have found that in-house telemarketing has contributed to a reduction in the cost of sales, overall, while increasing the companies' reach to prospective subscribers. Commission adoption of the TSR's call abandonment and answer time obligations for in-house telecommunications company telemarketing operations would, however, create a Hobson's Choice.

Under the call abandonment and answer time limitations, fewer calls could be physically answered with existing staff levels. Where an answered telemarketing call would otherwise be held by a predictive dialer for a marginally longer period of time prior to establishing a connection with the next available telemarketing representative, the call abandonment and answer time limitations preclude these longer connection times. This requirement would result in a far greater number calls being abandoned or going unanswered. In a process where sale success is dictated by the laws of probability and statistics, the fewer calls that are answered, the lower the sales potential during any given period of time, all else remaining equal. To maintain pre-rule sales levels, telecommunications companies who engage in-house telemarketing staffs would be faced with the difficult economic choice of increasing the size of their telemarketing staffs to ensure that more calls are connected to available telemarketers within the specified call abandonment and answer time parameters, or accept a lower level of sales, with no countervailing reduction in cost, if telemarketing were to be considered as an ongoing sales option.[9]

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[9] In California where similar call abandonment and answer time obligations were broadly imposed on all entities engaged in telemarketing by regulation, the Company experienced a thirty percent (30%) reduction in telemarketing sales productivity, primarily contributing to the Company's decision to cease telemarketing sales efforts in California altogether. *See e.g., Order Instituting Rulemaking on the Commission's Own Motion to Establish an* Appropriate Error Rate *for Connections Made by an Automatic*

If the decision were made to increase telemarketing staff, sales costs would rise precipitously. In addition to assuming greater payroll costs to increase staff, companies would also assume related benefit and administrative support costs. Telemarketing staff increases would require additional office space at greater expense or foregone opportunities to house other operational staff or equipment. Additional telephone equipment would be needed to support an expanded telemarketing staff. Inherent predictive dialer capabilities further limit the number of telemarketers that could be connected. Staffing increases could necessitate deployment of additional predictive dialer equipment, which would in turn require added equipment, installation, and housing costs. Aggregated compliance costs would quickly exceed the benefit of telemarketing.

The alternative to adding staff would be to maintain existing telemarketing staffing and equipment levels, and accept an estimated one third decline in productivity and sales,[10] attributable simply to an inability to otherwise meet strict call abandonment and answer time requirements. Such a decline in productivity would also create unacceptable cost per sale increases. Either outcome would render in-house telemarketing unviable.

Where larger telecommunications companies employing dedicated telemarketing centers may be able to absorb such added compliance costs without appreciable impacts on sales, sales costs, profitability, customers, and rates, when distributed over large national customer bases, smaller companies could not absorb such increased costs over far smaller regional customer bases. Faced with rising telemarketing compliance costs, smaller telecommunications companies could engage commercial telemarketing

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Dialing Device Pursuant to Section 2875.5 of the Public Utilities Code, Public Utilities Commission of California, *Interim Opinion*, Rulemaking 02-02-020 (February 21, 2002).

[10] Based on the Company's California experience.

companies to assume the role of in-house telemarketing staffs. Yet notwithstanding loss of direct control over telemarketing agents, smaller companies would nevertheless be forced to assume commercial telemarketing firm compliance costs, which are passed on to their clients – here the small telecommunications companies - creating a proverbial "Catch 22."

Passing on added compliance costs to smaller telecommunications service customer bases would not a viable option, as even marginal rate increases would result in lost subscribers *and* sales in the highly competitive interexchange telecommunications industry, magnifying compliance costs and foregone revenues. In light of a choice among the lesser of evils, smaller companies would have little choice but to experience a reduction in revenue under any approach if they elected to continue utilizing in-house telemarketing.

B) Call Abandonment and Answer Time Obligations Would Impose Added and Unnecessary Sales Costs on Telecommunications Companies, Regardless of the Method Chosen to Market Company Services.

Adoption of the FTC's call abandonment and answer time provisions on telecommunications companies would present a second Hobson's choice: 1) to pursue more costly telemarketing activities; or 2) to "retool" sales efforts through engagement of dedicated sales staffs, outside agents, and/or broad-based marketing campaigns aimed at attracting a wider range of customers. All options carry a commensurate added cost of doing business, with no countervailing increase in sales over existing telemarketing efforts.

As noted, the cost of pursuing in-house telemarketing or engaging outside commercial telemarketing firms to comply with TSR section 310.4(b)(4) obligations would increase precipitously to the point of eliminating telemarketing altogether as a sales tool. Alternative sales methods are no less costly, in relation to the potential for maintaining minimum sales levels. In the highly competitive interexchange industry, personal contact with prospective subscribers has historically proven effective. In the absence of telemarketing, telecommunications companies who serve residential markets in particular, would be required to augment in-house sales forces or engage sale agents to contact prospective subscribers, likely at the added inconvenience of prospective customers. Either option would simply constitute a significantly more costly and less productive sales alternative to telemarketing. Again, neither option would enable the company to recoup lost sales resulting from new telemarketing rule compliance costs. These added costs must be weighed against any perceived benefit that might accrue to a fraction of the population affected by the adoption of call abandonment and answer time obligations on telecommunications companies.

III. CURRENT RULES AND TECHNOLOGY PROVIDE ADEQUATE PUBLIC PROTECTION, MOOTING THE NECESSITY TO ADOPT THE TSR'S COSTLY CALL ABANDONMENT AND ANSWER TIME PROVISIONS FOR TELECOMMUNICATIONS COMPANIES.

Other provisions in the FTC's TSR and Commission's telephone solicitation rules coupled with state rules and advances in telephone equipment technology render the need for adoption of the TSR's call abandonment and answer time obligations to smaller telecommunications companies who utilize in-house telemarketing staffs unnecessary.

The new national Do-Not-Call list and thirty state Do-Not-Call list laws guarantee that those individuals who do not wish to be contacted by telemarketers will not receive telemarketing calls, under severe financial penalties for non-compliant telemarketers. The remaining states are considering enactment of state Do-No-Call list laws. Penalties residing in these laws create strong incentives to preclude any entity engaged in telemarketing to avoid contact with those individuals who have requested to be added to Do-Not-Call lists.

Many states have enacted some form of telemarketing laws and/or rules beyond Do-No-Call list laws. Of those states, the Company is aware of only one state, California, which has adopted a specific call abandonment rule similar to the TSR's requirements. By not imposing strict call abandonment and answer time obligations in state law, the states have accorded a degree of flexibility which should not now be denied to telecommunications companies who utilize in-house telemarketing for sales purposes through Commission adoption of the TSR's call abandonment and answer time provisions.

Use of Caller Identification ("Caller ID") technology now accords those who receive telemarketing calls the option of accepting or rejecting these calls. Pursuant to section 310.4(a)(7) of the TSR,[11] telemarketers are prohibited from blocking transmission of the telemarketer's telephone number. If this provision is similarly adopted by the Commission, those receiving telemarketing calls from telecommunications companies can determine that the calling number originates from an unknown caller, and can elect not to accept the call before the call is connected to the telemarketer.

Individuals subscribing to voice mail services have the added capability of allowing calls to be forwarded to voice mail after a customer-specified number of rings. This capability enables these customers to avoid calls they do not wish to answer, even if

[11] 47 C.F.R. § 310.4(a)(7). Abusive marketing practices include, "(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call;"

the calls may continue ringing for more than the TSR's specified four second non-connect time.

These factors, coupled with the control that telecommunications companies who utilize in-house telemarketing exert over telemarketing staffs, and the Commission's broad authority to preclude abuses by regulated telecommunications companies, eliminate the necessity for explicit call abandonment and answer time obligations in the Commission's rules.

IV. TELECOMMUNICATIONS COMPANIES, WHICH RELY ON IN-HOUSE TELEMARKETING, DO NOT IMPOSE THE SAME POTENTIAL RISK FOR ABUSE AS COMMERCIAL TELEMARKETING FIRMS TO WARRANT ADOPTION OF THE FTC'S TSR CALL ABANDONMENT AND ANSWER TIME OBLIGATIONS.

In-house telemarketing staffs, unlike commercial telemarketers, present significantly reduced levels of risk for potential abuse to the public by the very nature of their relationship to their "client," the telecommunications company. As opposed to commercial telemarketing firms who may call on behalf on multiple clients and are often compensated exclusively on the number of calls processed and the number of completed sales, in-house telemarketing staffs represent only one client. Their long-term employment depends on successful representation of their company's services to the public. In-house telemarketing staffs are not detached from their client, and maintain a vested interest in presenting their company in the most favorable light.

The company too, whose identity is clearly known to the prospective subscriber, must avoid annoyance to prospective subscribers. This translates into company policies that minimize annoyance or inconvenience to prospective subscribers. As in-house telecommunications company telemarketing sales staffs and the company maintain an entirely different relationship with prospective subscribers, the absence of call abandonment and answer time restrictions in the Commission's rules will not expose the public to greater risk and inconvenience.

V. CONCLUSION

TSR section 310.4(b)(4) call abandonment and answer time restrictions, if adopted into the Commission's rules, stands to significantly increase the cost of sales, reduce the number of sales, and ultimately render in-house telemarketing economically unviable, without an appreciable added protection to the public. As the Commission now considers harmonization of its telemarketing rules and the TSR against the adverse impact that these restrictions will have on smaller companies in particular, the Company urges the Commission to forgo adoption of TSR section 310.4(b)(4) into its telemarketing rules, consistent with its expressed policy objectives of not overburdening companies.. Should the Commission believe it imperative to address telemarketing call abandonment and answer time concerns, it may do so through establishment of general guidelines for unspecified reasonable call abandonment and connection times, which allow telecommunications companies added flexibility without the threat of strict compliance and assumption of the attendant penalties unless a pattern of demonstrated abuse is found.

Respectfully submitted this 2nd day of May, 2003,

MILLER ISAR, INC.

By: ________________________

Andrew O. Isar
President
7901 Skansie Avenue, Suite 240
Gig Harbor, WA 98335
Telephone: 253.851.6700
Regulatory Consultants to
The Company